

FILED

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SUSAN Y. SOONG
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 IN RE:) Case No. 4 : 20 - x r - 90540 - KAW
14)
14 REQUEST FROM VIETNAM FOR) Memorandum of Points and Authorities in Support of
15 ASSISTANCE IN A SMUGGLING) Application for Appointment of Commissioners to
16 INVESTIGATION,) Execute Foreign Legal Assistance Request
16)

17 INTRODUCTION

18 The United States is seeking an Order appointing Assistant United States Attorney Maureen C.
19 Bessette to be Commissioner to collect evidence requested by Vietnam (“the Request”) and to seek other
20 Orders, as needed, to execute the Request, as authorized by 18 U.S.C. § 3512.¹

21 A. Request for Production of Criminal Evidence Located in the NDCA

22 On March 18, 2019, the Central Authority of Vietnam, the People’s Procuracy, submitted the
23 Request for assistance. As stated in the Request, the Ho Chi Minh City Public Security, Investigation
24 Police Division requests legal assistance from the U.S. Department of Justice, Office of International
25 Affairs, in its criminal investigation. The investigation involves the smuggling of walnuts from
26 California into Vietnam, by mislabeling them as almonds. Vietnamese authorities believe that the nuts

27
28 ¹ The United States does not have a Mutual Legal Assistance Treaty with Vietnam but hereby seeks to respond to Vietnam’s request pursuant to the principle of reciprocity.

1 were intentionally mislabeled in order to avoid the payment of import taxes, in violation of Vietnam
2 Penal Code, Article 188 § 4 (smuggling).

3 The facts are as follows:

4 In July 2016, an entity in Vietnam (“Importer”) signed a contract to import walnuts from an
5 entity in San Leandro, California (“Exporter”), with an attendant import tax of 30%. The accompanying
6 customs declaration form dated July 30, 2016, declared that the 617 barrels consisted of almonds valued
7 at USD \$18,510, with an attendant import tax of 10%. Vietnamese authorities examined the 617 barrels
8 and determined that they contained walnuts, valued at approximately USD \$33,263), and an import tax
9 of 30%.

10 Authorities interviewed the Importer who admitted that he had entered into a contract with the
11 San Leandro Exporter to buy 1,100 barrels of walnuts, for USD \$41,250. The Importer prepared a
12 Customs Declaration form dated July 30, 2016, to reflect almonds, instead of walnuts, in order to pay
13 the lower 10% tax for almonds. The Importer also told authorities that he called the Exporter and asked
14 them to adjust the documents and contract for the shipment to make it appear that he had purchased 617
15 barrels of almonds for USD \$18,510.

16 Authorities obtained a certificate of plant quarantine for this shipment, which showed the
17 exported product was 1,100 barrels of walnuts.

18 Vietnamese authorities ask the United States to obtain documents and testimony on this shipment
19 from the Exporter and the shipper.

20 Although there is no treaty with Vietnam obligating the United States to assist in responding to
21 the Request, the United States does so as a matter of reciprocity. The undersigned seeks to be appointed
22 Commissioner by this Court pursuant to 18 U.S.C. § 3512, in order to issue and serve Commissioner
23 Subpoenas on the above entities to obtain the requested information.

24 B. Authority to Grant the Request for Assistance Under Applicable Law

25 Pursuant to applicable statutory authority and its inherent authority, federal courts may issue
26 orders as necessary for the production of evidence requested by foreign countries, including issuing
27 orders appointing a person to act as a Commissioner to gather such evidence. *See* 18 U.S.C. § 3512.

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1 When executing a treaty or non-treaty request for assistance from a foreign authority, an attorney
 2 for the government may file an application to obtain any requisite court orders under 18 U.S.C. § 3512.
 3 This section authorizes a federal court to issue such orders and provides in pertinent part:

4 Upon application, duly authorized by an appropriate official of the Department of Justice,
 5 of an Attorney for the Government, a Federal judge may issue such orders as may be
 6 necessary to execute a request from a foreign authority for assistance in the investigation
 or prosecution of criminal offenses, or in proceedings related to the prosecution of
 criminal offenses, including proceedings regarding forfeiture, sentencing, and restitution.

7 * * *
 8 [A]n application for execution of a request from a foreign authority under this section
 may be filed . . . in the District of Columbia.

9 * * *
 10 The term “foreign authority” means a foreign judicial authority, a foreign authority
 11 responsible for the investigation or prosecution of criminal offenses or for proceedings
 12 related to the prosecution of criminal offenses, or an authority designated as a competent
 authority or central authority for the purpose of making requests for assistance pursuant
 to an agreement or treaty with the United States regarding assistance in criminal matters.

13 18 U.S.C. § 3512(a)(1), (c)(3), (h)(2).

14 Congress enacted this section to make it “easier for the United States to respond to
 15 [foreign] requests by allowing them to be centralized and by putting the process for handling
 16 them within a clear statutory scheme.” 155 Cong. Rec. 6,810 (2009) (statement of Sen.
 17 Whitehouse); Foreign Evidence Request Efficiency Act of 2009, Pub. L. No. 111-79, 123 Stat.
 18 2086.² This section provides clear authority for the federal courts, upon application duly
 19 authorized by an appropriate official of the Department of Justice, to issue orders that are
 20 necessary to execute a foreign request.

21 An application is duly authorized by an appropriate U.S. Department of Justice official when the
 22 Office of International Affairs³ has reviewed and authorized the request, and executes the request itself
 23

24 ² Prior to the enactment of 18 U.S.C. § 3512, the United States routinely utilized the procedures
 25 authorized by 28 U.S.C. § 1782 (the “commissioner” process) to execute requests from foreign authorities. *See In*
 26 *re Request from the United Kingdom*, 685 F.3d 1, 11 (1st Cir. 2012) (18 U.S.C. § 3512 provides a more
 27 streamlined process than 28 U.S.C. § 1782, the statute under which foreign requests were executed prior to
 enactment of section 3512); *see also Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 247-49 (2004)
 (describing history of Section 1782). When enacting Section 3512, Congress anticipated that improved U.S.
 handling of foreign requests would ensure reciprocity in response to U.S. requests for assistance in its criminal
 investigations. *See, e.g.*, 155 Cong. Rec. 10,093 (2009) (statement of Rep. Schiff).

28 ³ The Attorney General, through regulations and Department of Justice directives, delegated to the Office
 of International Affairs the authority to serve as the “Central Authority” under treaties and executive agreements
 MEMO OF POINTS AND AUTHORITIES

1 or delegates execution to another attorney for the government.⁴ Upon such a duly authorized
 2 application, Section 3512 authorizes a federal judge⁵ to issue “such orders as may be necessary to
 3 execute [the] request,” including: (1) search warrants under Fed. R. Crim. P. 41; (2) orders for
 4 electronic records under 18 U.S.C. § 2703; (3) orders for pen registers or trap and trace devices under 18
 5 U.S.C. § 3123; and (4) orders appointing a person to direct the taking of testimony or statements and/or
 6 the production of documents or other things. *See* 18 U.S.C. § 3512(a)(1)–(b)(1). In addition, a federal
 7 judge may order any necessary procedures to facilitate the execution of the request, including any
 8 procedures requested by the foreign authority to facilitate its use of the evidence. 18 U.S.C. § 3512(a)(1).

9 Section 3512 also authorizes any person appointed to direct the taking of testimony or statements
 10 and/or the production of documents. The appointed person has authority to: (1) issue an order requiring
 11 a person to appear and/or produce documents or other things; (2) administer any necessary oaths; and (3)
 12 take testimony or statements and receive documents or other things. 18 U.S.C. § 3512(b)(2). In
 13 ordering a person to appear and/or produce documents or other things, the person appointed, commonly
 14 referred to as the “commissioner,” typically uses a subpoena entitled “Commissioner’s Subpoena.” Any
 15 such subpoena may be served or executed anywhere in the United States. 18 U.S.C. § 3512(f). A
 16 sample “Commissioner’s Subpoena” is included as Attachment A.

17 C. The present request qualifies for assistance pursuant to applicable statutory authority

18 The Office of International Affairs has reviewed and authorized the Request, and is executing the
 19 Request itself. Consequently, this application for an Order appointing the undersigned attorney as a
 20 commissioner to collect evidence and to take such other action as is necessary to execute the Request
 21 has been “duly authorized” within the meaning of Section 3512. In addition, the Request was submitted
 22 by an appropriate “foreign authority,” the designated Central Authority in Vietnam, and seeks assistance
 23 in a smuggling investigation, in violation of Article 188 § 4 of the Vietnam Penal Code, a criminal

24 _____
 25 between the United States and other countries pertaining to mutual assistance in criminal matters. *See* 28 C.F.R.
 0.64-1, 0.64-4, and Appendix to Subpart K, Directive Nos. 81B and 81C (2018).

26 ⁴ “Section 3512 can be invoked only when authorized by OIA. . . Such authorization occurs when an
 27 attorney for the government, or his or her office, receives the referral of the request for execution from OIA.”
 Memorandum from the Deputy Attorney General to Department of Justice Components (May 16, 2011) (on file
 with the Office of International Affairs).

28 ⁵ The term “federal judge” includes a magistrate judge. *See* 18 U.S.C. § 3512(h)(1); Fed. R. Crim. P.
 1(b)(3)(B) (including a magistrate judge in the definition of federal judge).

1 offense in Vietnam. The requested Order is necessary to execute the Request, and the assistance
 2 requested, *i.e.*, documents and testimony, falls squarely within that contemplated by Section 3512 and
 3 the Treaty. Finally, this application filed in the Northern District of California where the evidence lies.

4 This application is being made *ex parte*, consistent with U.S. practice in its domestic criminal
 5 matters.

6 When executing a foreign request for assistance in a criminal matter, Section 3512 authorizes the
 7 use of compulsory process comparable to that used in domestic criminal investigations and/or
 8 prosecutions. Because subpoenas utilized in U.S. criminal proceedings (*i.e.*, grand jury and criminal
 9 trial subpoenas) are issued without notice to any person other than the recipient (*i.e.*, no notice to targets
 10 or defendants), orders and commissioner subpoenas issued in execution of a foreign request pursuant to
 11 Section 3512 likewise should require no notice other than to the recipients. This is true even if the
 12 Requesting state seeks financial records, because the Right to Financial Privacy Act, 12 U.S.C. §§ 3401
 13 et seq., including its notice provisions, does not apply to the execution of foreign requests for legal
 14 assistance. *Young v. U.S. Dept. of Justice*, 882 F.2d 633, 639 (2d Cir. 1989), *cert. denied*, 493 U.S. 1072
 15 (1990); *In re Letters of Request from the Supreme Court of Hong Kong*, 821 F. Supp. 204, 211
 16 (S.D.N.Y. 1993); *In re Letter of Request for Judicial Assistance from the Tribunal Civil de Port-Au-*
 17 *Prince, Republic of Haiti*, 669 F. Supp. 403, 407 (S.D. Fla. 1987). Accordingly, this Court should
 18 authorize a commissioner to collect the evidence requested without notice to any person other than the
 19 recipient(s) of any given commissioner subpoena.

20 Therefore, the United States respectfully requests that this Court issue the attached Order,
 21 pursuant to 18 U.S.C. § 3512, appointing the undersigned Assistant U.S. Attorney Maureen C. Bessette
 22 as Commissioner, authorizing the undersigned to take the actions necessary, including the issuance of
 23 commissioner's subpoenas, as needed, to collect the evidence necessary to execute any pending request
 24 for assistance and any subsequent supplemental requests in connection with the same matter, to do so in
 25 a manner consistent with the intended use of the evidence.

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28 ///

CONCLUSION

Accordingly, the government respectfully requests that this Application be granted and that the accompanying Order Appointing the Commissioner be issued.

DATED: April 28, 2020

Respectfully submitted,

DAVID L. ANDERSON
United States Attorney

/s/
MAUREEN C. BESSETTE
Assistant United States Attorney

ATTACHMENT A

COMMISSIONER'S SUBPOENA FOR TESTIMONY AND DUCUS TECUM

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION
CASE NO. CR 20- MISC

ISSUED TO: Representative of _____

I, Commissioner Maureen C. Bessette, Assistant United States Attorney for the Northern District of California, acting under authority of Title 18, United States Code, Section 3512, as well as a Commission from a Federal Judge, for the purpose of rendering assistance to Vietnam, command that you appear before AUSA Bessette at the United States Attorney's Office, located at 1301 Clay Street, Suite 340S, Oakland, California 94612, on ____ __, 2020, at __:00 a.m., for inquiry in the Matter of Vietnam, involving smuggling in violation of Article 188 § 4, Vietnam Penal Code.

In addition, please bring the

For failure to attend and provide testimony and/or said records, or for disclosure of the existence of the subpoena, you may be deemed guilty of contempt and liable to penalties under the law.

DATE: April __, 2020

Maureen C. Bessette
Appointed Commissioner
U.S. Attorney's Office, Northern District of California
Telephone: (510) 637-3691

COMMISSIONER'S SUBPOENA

Issued under authority of an Order of the United States District Court
For the Northern District of California
Title 18, United States Code, Section 3512

RETURN OF SERVICE

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE

I, being a person over 18 years of age, hereby certify that a copy of this subpoena was duly served on the
person named herein by means of:

Personal delivery to an individual, to wit:

(Name) _____

(Title) _____

(Address) _____

personal delivery to an address, to wit:

(Description of premises) _____

(Address) _____

registered or certified mailing to:

(Name) _____

(Address) _____

() a.m., at _____ () p.m. on _____

(SIGNATURE) _____

(TITLE) _____

(DATE) _____

Upon contumacy or refusal to obey, this subpoena shall be enforceable by order of the United
States District Court.